Supreme Court, U.S.
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No. 94-1545

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NORTH GEORGIA ELECTRIC
MEMBERSHIP CORPORATION,

Petitioner,

v.

CITY OF CALHOUN, GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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May 4, 1995

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NEW ARGUMENTS RAISED IN RESPONDENT'S OPPOSITION BRIEF ARE ERRONEOUS AS A MATTER OF LAW AND FACT

Respondent raises two new arguments in its Opposition Brief, each of which is premised on erroneous statements of law and/or fact. As Petitioner demonstrates herein:

1. Respondent wrongly contends that the U.S. District Court decisions cited by Petitioner are void, and thus present no federal-state conflict on questions of law. Under well-settled precedent of this Court, the U.S. District Court decisions constitute valid, final rulings of law entitled to *res judicata* effect. Thus, the conflicting ruling by the Supreme Court of Georgia at issue here raises special and important reasons for granting certiorari.

2. Respondent also erroneously argues that the TVA has concurred that cities have the right to tax gross receipts from the sale of TVA electricity supplied by cooperatives, which Respondent contends are not "franchises" of the TVA. To the contrary, the TVA specifically includes cooperatives such as Petitioner as "an essential part" of its "federal power operations' program" and has concluded that Respondent's tax on gross receipts is improper.

ARGUMENT

This Petition for Writ of Certiorari seeks review of a decision of the Supreme Court of Georgia which wrongfully preempts the statutory policy of the United States as enunciated in the Tennessee Valley Authority Act, 16 U.S.C. Section 831 (hereinafter the "TVA Act"). The decision by the Supreme Court of Georgia is in direct conflict with three decisions by U.S. District Courts which are final decisions. There is, therefore, a federal court-state court conflict which has produced and will produce different and economically significant results in the application of the TVA Act depending upon whether one looks to the state or the federal decisions. An important question of the power of a state court to preempt federal statutory policy is presented in this Petition.

Since the issue herein is the correctness of the Georgia Supreme Court's conclusion that it is permissible for Georgia municipalities to tax the gross receipts of the sale of Tennessee Valley Authority ("TVA") electric power within a municipality, it is necessary to examine the basis of that decision. The Georgia Supreme Court based its holding upon the conclusion that Petitioner North Georgia Electric Membership Corporation did not have a "franchise" within the meaning of Section 13 of the TVA Act. The validity of this holding is determinative because Section 13 expressly prohibits taxation by a state or municipality of the TVA and its "franchises."

Respondent suggests that the issue presented herein cannot rise to a sufficient level of importance for this Court's consideration because it does not pit the decision of the highest court in the state against a contrary decision by a United States court of appeals. While this Court may ordinarily prefer to allow a court of appeals to address a matter which has been ruled on differently by federal district courts and a state's highest court, the conflict presented here will not be addressed in the foreseeable future by a U.S. court of appeals. The conflicting federal district court decisions date from 1989 through 1991 and were either not appealed or the appeal was voluntarily dismissed.[1] Notwithstanding Respondent's unsupported contention that the federal district court decisions were improperly rendered because the district court lacked subject matter jurisdiction, these federal decisions are, and remain, valid and final rulings of law entitled to *res judicata* effect. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166-167 (1932) (principles of *res judicata* apply to jurisdictional questions); *Jackson v. Irving Trust Co.*, 311 U.S. 494, 499-503 (1941) (remedy of jurisdictional question is by appeal).

Moreover, Respondent's argument is unavailing because it is the importance of the issue which is determinative, especially on a "question touching the

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[1] Two of the federal district court cases -- *Town of Courtland v. Town of North Courtland*, No. 90-L-1346-NE (N.D. Ala. Dec. 28, 1990) and *City of Sheffield v. Town of Cherokee*, No. 89-AR-5073-NW (N.D. Ala. Oct. 12, 1989) -- were never appealed. In the third district court case, an appeal was noticed and then voluntarily dismissed. *See Cullman Electric Cooperative v. City of Cullman*, No. 91-N-665-NE (N.D. Ala. Aug. 30, 1991), appeal dismissed (11th Cir. Jan. 15, 1992).

accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). In *Kosydar*, a state supreme court was reversed because its interpretation of the state's taxing authority contravened constitutional limitations on taxing set forth in Article I, Section 10, the Import-Export Clause. Likewise, this petition involves an important concern which, if not addressed by this Court will lead to inconsistent interpretations of the TVA Act by State and Federal Courts as well as frustration of the Congressional intent in passing Section 13.

Respondent also argues that when Congress used the term TVA "franchises" in Section 13, it must have meant something other than providing for the distribution of the federal property, *i.e.*, electric power, through a contractual arrangement with a non-profit corporation formed for the sole purpose of distributing TVA electric power pursuant to its contract with the TVA and exclusively on terms and conditions set by the TVA. Support for this exclusionary definition of "franchise" as used in the TVA Act is said to be derived from an Alabama court of first instance decision, *City of Centre, Alabama, et al. v. Cherokee Electric Cooperative, et al.*, No. CV-92-009 (Cherokee, Ala. Cir. Ct. July 23, 1993) (appeal pending, Alabama Supreme Court), in which the trial court upheld a gross receipts tax similar to that imposed by the City of Calhoun. Respondent City of Calhoun's reliance on *City of Centre* emphasizes the importance of review by this Court because it illustrates the mischief which will result from inconsistent interpretations of the TVA Act by State courts and Federal courts. Only this Court can prevent the uncertainty and confusion that will

inevitably result if the decision of the Georgia Supreme Court is not reviewed.

Respondent's contention that the TVA has concurred that cities have the right to tax gross receipts from the sale of TVA supplied electricity is demonstrably incorrect, as shown by the November 1, 1994 letter from the Board of Directors of the TVA to the Clerk of the Supreme Court of Georgia (appended hereto at App. 85a).[2] The Board's letter reminded the Georgia Supreme Court that TVA is a federal instrumentality created by an act of Congress to carry out certain statutory objectives. Contrary to the arguments of Respondents which liken distribution cooperatives to arm's length commercial purchasers of electricity, the TVA specifically includes the cooperatives as "an essential part of this federal power operations' program." Indeed, the TVA defines its relationship with the cooperative as a "partnership." The opinion of the Supreme Court of Georgia ignored the TVA's statement to that court when it opined that North Georgia's distribution of TVA power was not exempt from taxation.

The TVA's letter characterized the issue created by the City of Calhoun's gross receipts tax as one of first impression, one on which the Board had not previously taken a position. In addressing this issue, the Board concluded that Calhoun's tax on gross receipts was

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[2] The TVA has been held to be a governmental agency of the United States, which, "except as Congress may otherwise consent, is free from state regulation or control." *Posey v. Tennessee Valley Authority*, 93 F.2d 726, 727 (5th Cir. 1937). The TVA Act empowers TVA's Board of Directors "to direct the exercise of all the powers of the Corporation." 16 U.S.C. Section 831a(g).

improper. Moreover, the TVA referred the Georgia Supreme Court to the federally imposed in-lieu-of-tax-payments as support for its position that the municipalities additional gross receipts tax "should not be imposed."[3]

CONCLUSION

Unless this Court resolves the issue of whether the distribution of TVA power by non-profit cooperatives (whose sole purpose is to distribute TVA electric power pursuant to contractual terms and conditions set by the TVA) qualifies as a franchise within the meaning of the Act, some cooperatives will be subject to gross receipts taxes by municipalities while others will not. Those cooperatives which have obtained relief from federal courts based upon the determination that they are franchises will not pay the tax, whereas cooperatives bound by findings of the state courts that they do not qualify as franchises will be taxed. This inconsistent result

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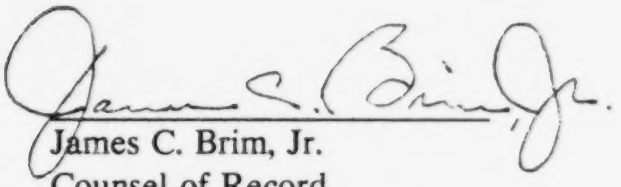
[3] In the opposition, Respondent attempts to defend the imposition of a tax on gross receipts as justified because Petitioner has paid *ad valorem* taxes on its property located within Calhoun City limits. These payments create no issue here since (1) as the November 1, 1994 letter from the TVA to the Georgia Supreme Court notes, neither North Georgia nor TVA have contested these taxes and, (2) the Section 13 exemption attaches, not to the tangible property owned by North Georgia, but to the actions taken by North Georgia as a part of the federal power operations of TVA, *i.e.*, the distribution of TVA power and the very activity which the City of Calhoun's business tax seeks to reach.

would destroy the uniform application of Section 13 of the TVA Act.

This disparity will be of substantial economic significance as it applies to cooperatives throughout the seven state area in which the TVA sells its electric power.

Moreover, even in the absence of contrary interpretations of Section 13 by federal courts, the holding of the Supreme Court of Georgia is incorrect, contrary to the TVA Act, and destructive of the Federal policy established in the Act. Local government taxation of the gross receipts of non-profit cooperatives whose only business is to distribute TVA supplied power at TVA approved rates would allow local political subdivisions to undermine Congress' stated desire to provide low-cost electric power to the members of such cooperatives.

Respectfully submitted,



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APPENDIX

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Board of Directors

NOV 1 1994

The Honorable Sherie M. Welch
Clerk
Supreme Court of Georgia
Room 572
244 Washington Street, S.W.
Atlanta, Georgia 30334

Dear Ms. Welch:

The TVA Board of Directors is making this submission about a matter being considered by the Court in the appeal (No. S94A1009) of the case involving a cooperative distributor of TVA power and a Georgia municipality. The cooperative has informed TVA that unfair taxes are being imposed on it by a municipality in which it serves, and that in defending itself in this litigation the cooperative is seeking judicial relief from such tax burdens.

As you know, TVA is a Federal instrumentality created by an Act of Congress to carry out certain statutory objectives. One of the primary objectives set out

by Congress in that statute is making electric power available to the people of the TVA region at the lowest feasible rates. The 160 distributors of TVA power, including the cooperatives in this case, are an essential part of this Federal power operations program, in a partnership with TVA. From the beginning, TVA has worked together closely with each distributor to help minimize its cost of supplying electric power to consumers. TVA strongly supports any effort of distributors to remove any improper tax burdens upon their operations, and we are concerned about the potential for any such burdens to increase in the future.

The Act of Congress governing TVA requires that TVA's Board of Directors direct the exercise of all TVA actions. While there have been references to previous actions by TVA, or some of its employees, this Board has not taken a position on the issues involved in this litigation. In the TVA Board's view, the taxes involved in this litigation should not be imposed on the cooperative, particularly in light of the substantial in-lieu-of-tax payments TVA makes each year. Since the litigation involving the cooperative distributor arose, TVA has examined the matter, and the TVA Board is in agreement with the cooperative distributor on the conclusion that business privilege taxes on gross receipts derived from the distribution of TVA power by this not-for-profit cooperative distributor should not be imposed.

With regard to service provided by cooperative distributors, we would point out that this is a time of increased competition in the electric supply industry. They have paid ad valorem taxes on their properties and

neither they nor TVA contest the applicability of those taxes to cooperative properties. It is crucial to the viability of these cooperatives, and the welfare of the consumers they serve, that they not be saddled with the disproportionate share of the cost of providing public services. The imposition of more than their fair share of such costs would, of course, unfairly interfere with the joint efforts of TVA and these cooperatives to promote economic development in their area of service. We, therefore, express our firm support of the distributors' objective of ensuring that any cooperative not be subjected to an unfair tax burden.

We will appreciate your submitting this submission to the Court, and the Court taking the TVA Board's determinations and concerns into consideration in this matter.

Sincerely,

/s/
Craven Crowell
Chairman

/s/
Johnny H. Hayes
Director

/s/
William H. Kennoy
Director

cc: Mr. William P. Bailey
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